

NEVADA DIVISION OF WILDLIFE ET AL.
v.
BUREAU OF LAND MANAGEMENT
TULEDAD GRAZING ASSOCIATION (Proposed Intervenor)

IBLA 94-316, et al.

Decided March 26, 1997

Appeals from Orders of Administrative Law Judge Ramon M. Child dismissing Appeals of the Nevada Division of Wildlife, et al. from a Bureau of Land Management Decision that temporarily modified the Tuledad Allotment Management Plan and declaring the Motion of the Tuledad Grazing Association to intervene in the Appeals moot.

Dismissal Orders vacated, Motion to Intervene granted, and cases remanded for a hearing.

1. Administrative Procedure: Administrative Record--
Administrative Procedure: Hearings--Appeals:
Generally--Grazing and Grazing Lands--Grazing
Permits and Licenses: Appeals--Grazing Permits and
Licenses: Hearings--Hearings--Rules of Practice:
Appeals--Rules of Practice: Hearings

Under 43 C.F.R. § 4.472(a) an Administrative Law Judge should grant a motion of an association of grazing permittees to intervene in appeals from a BLM decision that amends the grazing system and monitoring sections of an allotment management plan.

APPEARANCES: William F. Schroeder, Esq., Vale, Oregon, John T. Schroeder, Esq., and W. Alan Schroeder, Esq., Boise, Idaho, for the Tuledad Grazing Association; C. Wayne Howle, Esq., Deputy Attorney General, State of Nevada, Carson City, Nevada, for the Nevada Division of Wildlife.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On April 15, 1992, the District Manager, Susanville (California) District, Bureau of Land Management (BLM), issued a Decision to grazing permittees in the Tuledad allotment that amended the grazing system and monitoring sections of the Tuledad Allotment Management Plan (Allotment Management Plan) for the next 3 years. The modification was designed to reduce grazing in the bitterbrush habitat of the East Lassen Deer Herd while an integrated vegetation management plan was being developed.

BLM placed its Decision into immediate effect, citing 43 C.F.R. § 4160.3(c) (1991). The Nevada Department (now Division) of Wildlife, the California Department of Fish and Game, the California Mule Deer Association, the Natural Resources Defense Council, the Sierra Club, the California Native Plant Society, and the Mountain Lion Foundation filed appeals. The Tuledad Grazing Association, consisting of several of the affected permittees, sought to intervene in the appeals. Administrative Law Judge Ramon M. Child, to whom the appeals were assigned, took the Association's Motion to Intervene under advisement. Before the scheduled hearing, Appellants reached a settlement agreement with BLM and withdrew their appeals. Based on the representations of BLM's Counsel at the hearing, Judge Child accepted the withdrawals, dismissed the Appeals, and denied the Association's Motion. He confirmed these actions in Orders issued January 10, 1994. The Association has appealed. 1/

The Association initially requested to be recognized as an intervenor and admitted as a party on September 30, 1993. Having heard that Appellants and BLM planned to take depositions of BLM witnesses on December 14, 1993, the Association filed a Motion to Intervene and a Motion to Expedite a decision on its Motion to Intervene so that it could participate. 2/ The Association also filed a Motion to Consolidate the appeals and a Motion to Dismiss the appeal of the Mountain Lion Foundation as untimely filed.

1/ The Association's appeals of Judge Child's Orders were docketed by the Board as IBLA 94-316 (Nevada Division of Wildlife), IBLA 94-317 (California Department of Fish and Game), IBLA 94-318 (California Mule Deer Association) and IBLA 94-319 (Natural Resources Defense Council et al.). The four appeals were consolidated by Order dated Mar. 9, 1994.

2/ The Association's Motion to Intervene stated:

"The TULEDAD GRAZING ASSOCIATION (proposed intervenors) are the owners and holders of livestock grazing preferences on the Tuledad Allotment. The proposed intervenors are affected interests, and are directly affected by the Decision and the appeals, and may be directly affected by the decision of the Office of Hearings & Appeals, Hearings Division, or may be directly affected by a settlement between the Appellants and Respondents regarding the decision. The Decision implements the first stage of a three staged plan to develop and implement an integrated management system on the allotment. This first stage, that is, this decision under appeal, implements only interim short-term changes in grazing practices.

"The Hearings Division should grant TULEDAD GRAZING ASSOCIATION'S motion to Intervene. The Order granting said motion should require the Appellants and the Respondent to: (1) copy Intervenor's lawyer with all Hearings Division filings related to the above entitled proceedings; (2) notify Intervenor's lawyer of all settlement conferences and settlement proposals between the Appellants and Respondent [See Glenn Grenke v. Bureau of Land Management, 122 IBLA 123, 129 (1992)]; (3) make all settlements conditioned upon the approval of intervenor; and (4) authorize intervenor to participate in any depositions or hearings relating to the above entitled matters."

After a December 7, 1993, telephone conference call with Judge Child in which BLM's Counsel said the Association could participate in the depositions, Judge Child denied the Association's Motion to Expedite and took its Motion to Intervene, Motion to Consolidate, and Motion to Dismiss the appeal of the Mountain Lion Foundation under advisement until a hearing calendar he had previously scheduled for January 3, 1994.

On December 13, 1993, having learned on December 10 from BLM's Counsel that the California Department of Fish and Game was planning to offer a settlement to BLM, the Association filed motions with Judge Child requesting an order mandating BLM to inform the Association of any proposed settlement before BLM accepted it and an order restraining BLM from offering Appellants any consideration that would adversely affect the Association. The Association renewed its Motion to Dismiss the Mountain Lion Foundation's appeal and also filed a new Motion to Dismiss the other appeals as frivolous, citing 43 C.F.R. § 4.470(d). On December 14, 1993, Judge Child took the motions to dismiss under advisement and gave BLM until January 3, 1994, to respond to the motions pertaining to settlement. In the meantime, he ordered, BLM "shall comply with the spirit and intent of said motions pending said response and a ruling thereon."

On December 20, 1993, BLM telecopied a copy of a proposed settlement agreement to the Association's Counsel. Attempts to arrange a meeting among BLM, the Nevada Department of Wildlife, the California Department of Fish and Game, and the Association to discuss the proposed agreement before the holidays were unsuccessful. On December 23, 1993, Counsel for BLM telecopied Counsel for the Association:

I have commitments from all appellants, other than the Mountain Lion Foundation, to withdraw their appeals in this matter, prior to the commencement of the hearing on January 3, 1994. Consequently, I am not anticipating a hearing in this matter. The BLM's decision which your clients sought to defend will remain in full force and effect; your clients will have the opportunity to appeal any new decision which is issued by BLM which implements the settlement agreement entered into by the parties. I have not, as yet, signed the agreement; however, I anticipate signing it prior to January 3, 1994. If you wish to discuss the terms of the settlement agreement with which your client disagrees, Mr. Urban [Deputy Attorney General for the State of California] and I will be pleased to meet with you in Sacramento during the week of December 26th. In the alternative, we would be happy to discuss this matter with you by telephone. If you wish to put your specific suggestions or comments to the provisions of the proposed settlement agreement in writing, we would be pleased to review them prior to January 3, 1994.

Counsel for the Association wrote Counsel for BLM on December 23, 1993, stating that a meeting during the week of December 26 would not

be possible and setting forth the Association's objections to the proposed settlement agreement. 3/ Counsel for the Association also filed a Motion to Dismiss the appeals for lack of prosecution, citing 43 C.F.R. §§ 4.472(a), 4.475(a), and 4.474(b). 4/

Meanwhile, the California Department of Fish and Game and the Nevada Department of Wildlife signed a "Stipulation Among Parties for Change in Decision and Withdrawal of Appeal" (Stipulation) on December 21 and 22, 1993. On December 27, 1993, the Nevada Department of Wildlife withdrew its appeal "[p]ursuant to the terms of a stipulation entered into * * * by the California Department of Fish and Game, the Nevada Department of Wildlife, and the United States Bureau of Land Management." 5/ The California Department of Fish and Game withdrew its appeal on January 3, 1994, on the same basis. The other Appellants jointly withdrew their appeals "[i]n light of the terms of the settlement agreement" on January 3. These withdrawals were sent to Counsel for BLM. 6/

When Judge Child convened the hearing on January 3, 1994, Counsel for BLM offered "these three documents which purport to unconditionally withdraw [all Appellants'] appeals." (Tr. at 4.) 7/ Noting the language of the withdrawals recited in the previous paragraph, Counsel for the Association expressed doubt that they were unconditional. Id. at 10-11. The Stipulation "submitted to the Hearings Division and you [Judge Child] on December 23, 1993, * * * is the price which the agency is apparently willing to pay [for the withdrawals] * * *. The payment of this price adversely impacts the moving intervenors substantially for the reasons previously stated [on December 23]." Id. at 11. Instead of carrying their

3/ A copy of the Association's Dec. 23, letter was sent to Judge Child. Although it was date-stamped as received by the Hearings Division in Salt Lake City on Dec. 27, 1993, apparently Judge Child did not receive it before Jan. 3, 1994. (Transcript of Jan. 3, 1994, Hearing (Tr.) at 28-30.)

The Association's objections to the proposed agreement were set forth in exhibit 7 of the Dec. 23, letter.

4/ Although this Motion, which is dated Dec. 24, 1993, was also received by the Hearings Division on Dec. 27, 1993, the copies of the Motion contained in the record are missing pages 2 and 4. The full text appears as exhibit L to the Association's Statement of Reasons (SOR) for appeal.

5/ Paragraph 6 of the "Stipulation Among Parties for Change in Decision and Withdrawal of Appeal" provides: "Withdrawal of Appeals. Upon execution of this agreement, CDFG [California Department of Fish and Game] shall withdraw, without prejudice, its appeal * * * and NDOW [Nevada Department of Wildlife] shall withdraw, without prejudice, its appeal * * *." See Exhibit I to the Association's SOR at 7. Counsel for BLM signed the Stipulation on Dec. 28, 1993. Id.

6/ Although dated Jan. 3, 1994, the other Appellants' withdrawal was received by Counsel for BLM on Dec. 30, 1993.

7/ The Association's Motion to Dismiss the appeal of the Mountain Lion Foundation appeal as untimely was granted. Id.

burden on appeal of demonstrating BLM's Decision was wrong, Counsel for the Association argued, Appellants' withdrawal on the basis of the Stipulation, the terms of which changed the Decision and disadvantaged members of the Association, had the unfair effect of shifting the burden to the Association to object to the disadvantageous terms. Id. at 8-10. The Association maintained that the Stipulation was "legally and factually flawed for the reasons stated within the presentation * * * dated December 23, 1993." Id. at 10.

Counsel for BLM replied that the Stipulation "really shouldn't be characterized as an agreement. It's more like a memorandum of understanding as to what the parties feel should happen with regard to this allotment." (Tr. at 12-13.) All interests would be able to participate in "the process that's going to be used to arrive at the decision which will be implemented next year." Id. at 13. "[T]he Bureau [BLM] still has complete decision [sic] as to what to do with the allotment." Id. at 14. "The decision insofar as the allotment is concerned today is going to remain as it was." Id. at 16.

The Association responded that "[u]nlike the decision from which these appeals were taken, this agreement -- their agreement provides for other and different specific management activities that are to be implemented instantly from the moment of that agreement and are to continue indefinitely." (Tr. at 20.) BLM acknowledged that the Stipulation "does constitute a predisposition toward a certain view," id. at 23, but suggested "it in no way prejudices the appellant [sic]." Id. at 24. "[I]t does predispose BLM to change that [April 15, 1992] decision next year. I think that's the proposal and the appellants [sic] are going to have a chance to appeal that." Id. at 26.

Judge Child asked Counsel for BLM why he was not given a copy of the Stipulation. "Well, in this case what purpose would it serve?" Counsel replied. (Tr. at 24.) "Well, it's conceivable," Judge Child responded,

that a nefarious document could be relied upon by the parties in order to dismiss a case and leave somebody out stranded who is in the position, at the present time, of wanting to support an existing decision which is being emasculated by the agreement.

I don't know that. This could happen. And if I'm supplied a document, I can evaluate that, but I have nothing before me to evaluate except I have your word.

(Tr. at 24.)

Based on the understandings that the Stipulation "is, in effect, meaningless except as it is a laundry list of procedures and strategies which BLM will consider in arriving at decisions in the future pertaining to these allotments," that it "is not a condition essential to the

dismissal of this action," and that "the decision appealed from herein stands," id. at 25, Judge Child accepted the Appellants' withdrawals:

Well, I'm inclined to think that based upon your representation it would be remiss for me to refuse to accept these withdrawals.

These withdrawals are effected in good faith and BLM still has the responsibility of administering the public lands within its discretion, providing it considers all of the statutory requirements having to do with multiple use and it would have to do that under -- at any event.

Id. at 28.

Judge Child's January 10, 1994, Orders dismissing the appeals and declaring the Association's Motions moot state:

The above captioned matter having come on regularly for hearing at a trailing hearing calendar at Sacramento, California, on Monday, January 3, 1994, and no one appearing for appellants, Burton Stanley, Esquire, appearing for the respondent, and William Schroeder, Esquire, and Alan Schroeder, Esquire, appearing on behalf of Tuledad Grazing Association, pursuant to a motion to intervene in this action; and Mr. Stanley having presented Withdrawal of Appeal on behalf of the above captioned appellants and having represented that said withdrawal was unconditional and that respondent was in no way impaired by the terms of the "settlement agreement" referred to in said withdrawal in exercising full discretion and jurisdiction required by law in managing the public lands referred to in the Final Decision, subject of this action nor pre-committed to any position thereby; and William Schroeder having read into the record his position and on behalf of the proposed intervenors regarding the withdrawals of appeal presented by Mr. Stanley and the Judge being fully advised of the premises made and now makes the following ORDER:

1. This case is DISMISSED.
2. The motions of the Tuledad Grazing Association to intervene and to consolidate, earlier taken under advisement, are moot.

Candor compels us to comment that at a minimum Counsel for BLM engaged in misleading practice in this case. He was informed by the Association's Counsel on December 10 that the Association objected to any proposed settlement that would vary the terms of BLM's April 15, 1992, Decision, and he received a copy of the Association's motions requesting Judge Child to order BLM to inform the Association before BLM accepted any proposed settlement and to restrain BLM from offering any consideration to the Appellants that might adversely affect the Association by telecopier on

December 11, 1993. He was instructed by Judge Child's December 14, 1993, Order, which he received on December 16, to comply with "the spirit and intent" of the Association's motions until January 3, 1994. He nevertheless proceeded to negotiate the Stipulation to Change Decision with the Nevada and California agencies and to procure signatures to the Stipulation on December 21 and 22, 1993, from those Appellants. He informed Counsel for the Association on December 23 that he planned to sign the Stipulation before January 3, 1994, and did so on December 28 -- presumably after he had received the Association's December 23 Letter setting forth its objections to the proposed Stipulation. He then presented the parties' withdrawals to Judge Child at the outset of the January 3, 1994, hearing -- without the Stipulation they were based on. We do not see how this course of conduct can be regarded as other than intentionally ignoring Judge Child's December 14, 1993, Order.

The Association's motions and Judge Child's Order were based on 43 C.F.R. § 4.472(a), which authorizes an Administrative Law Judge to conduct the hearing on an appeal from a grazing decision in "an orderly, impartial, and judicial manner." Other regulations provide similar authority in other proceedings. See 43 C.F.R. § 4.1121. In a case involving § 4.1121, we observed: "[I]t is imperative both to the just implementation of this Act and to the proper functioning of administrative review within the Department that parties, and especially the Department, cooperate with the ALJ's [Administrative Law Judge's] conduct of the proceeding and with his requests." Delight Coal Co., 1 IBSMA 186, 197, 86 Interior Dec. 321, 327 (1979). We have also said in a related context:

We do not condone Government counsel's uncooperative behavior in this case. The rules of practice of the Department are designed to promote development of a full and complete record and not to sanction use of surprise as a hearing tactic. * * * Strict compliance with both prescribed and customary procedures by Government counsel is needed to maintain the quality of justice a citizen rationally expects.

United States v. Robinson, 21 IBLA 363, 388, 82 Interior Dec. 414, 425-26 (1975). Lack of compliance with an Administrative Law Judge's orders not only subverts the quality of justice a citizen rationally expects; it destroys the Department's credibility and prevents achievement of its program objectives.

We are also troubled by Counsel's representation to the Association in his December 23 letter and to Judge Child at the January 3 hearing that BLM's April 15, 1992, Decision would remain in full force and effect and that the Association could appeal any new Decision that implemented the Stipulation Among Parties for Change in Decision. The April 15, 1992, Decision "implement[ed] short term actions (a) and (b) as stated above." Those actions were:

- a. Determine more conclusively which animals are using bitterbrush, to what extent they are using it and at what time

of year they are using it by constructing three-ways exclosures in bitterbrush areas.

b. Make a minimum amount of bitterbrush available for deer use by eliminating almost all livestock grazing on significant bitterbrush stands after seed ripe on grass (July 15) with the intent of limiting livestock use on bitterbrush to less than 10% of the annual leader growth. Measure success with actual use by season and area, including leakage.

(Decision at 3.) The Decision made specific changes to the grazing system in the Allotment Management Plan for cattle and sheep for 1992, 1993, and 1994. ^{8/} To evaluate the effectiveness of the grazing system specified in the Decision, the Decision set forth changes to the monitoring section of the Allotment Management Plan that would be implemented. The Decision stated it would "become effective April 15, 1992 and will remain in effect until October 15, 1994." (Decision at 8.)

Paragraph 1 of the Stipulation, however, provided:

1. Alteration of Decisions. By February 15, 1994, BLM shall supplement and modify the Interim Grazing Decision, dated April 15, 1992, for the Tuledad Allotment in accordance with the provisions of this Stipulation. The modified Interim Grazing Decision shall be in effect until the earlier of either the adoption of a decision implementing an Integrated Activity Plan covering the Tuledad Allotment, or December 31, 1995.

(Stipulation, supra note 5, at 2). The Stipulation required BLM to issue annual grazing authorizations for the allotment beginning in 1994 and set

^{8/} For example:

"Year 1 (1992)

Cattle - Approximately 50 cattle will graze in the Bald Mountain Use Area from April 15 to July 15. These cattle will be removed from the Allotment in July. Cattle will use the South Pasture from April 15 to July 15. Approximately 340 cow/calf pairs and 572 yearling cattle will enter the Rye Patch Use Area on April 15. Between May 1 and May 15, cattle will be allowed to drift to the higher elevation, Buckhorn Use Area.

Cattle will be in the Buckhorn Use Area from May 1 to July 15. On June 15, approximately 200 head of the yearling cattle will be moved from the Buckhorn Use Area to the Cottonwood Mountain Use Area. These cattle will graze in the Cottonwood Mountain Use Area from June 15 to August 1.

"Sheep - Two bands, including a total of approximately 3000 sheep will leave their winter range and enter the allotment at the Rye Patch Use Area.

These sheep will pasture through the Rye Patch and Lower Bare Creek Use Areas between March 26 and April 12. At this time, one band of approximately 1000 sheep will leave the allotment and move to the Coyote Allotment on Winnemucca District to lamb."

(Decision at 5-6.)

forth 11 "terms, conditions, and actions [that] shall apply to any annual grazing authorizations and to any BLM action in the Tulead allotment." 9/ Id. at 2-6. BLM was required to issue the annual grazing authorizations no later than February 15, 1994, and to place them "in full force and effect to the extent permitted by federal law." Id. at 6.

Either Counsel for BLM did not understand the terms of the Stipulation or he misrepresented them. While BLM's April 15, 1992, Decision was to remain in effect until October 15, 1994, the Stipulation provided that annual grazing authorizations were to be issued no later than February 15, 1994, with the specified terms and conditions and placed in full force and effect. It is apparent the Stipulation modifies BLM's Decision; it is not apparent that any further BLM Decision would be needed to implement the Stipulation (apart, of course, from the annual authorizations).

[1] It is regrettable that Judge Child had not read the Stipulation or the Association's December 23 comments on it that were sent to him before the January 3, 1994, hearing, for that would have enabled him to evaluate BLM Counsel's representations concerning it. In any event, we think it clear Judge Child erred in not granting the Association's motion to intervene, as he was authorized to do under 43 C.F.R. § 4.472(a). 10/ "As a matter of practice, we do not discourage intervenors or limit their arguments. See Bear River Land & Grazing v. BLM, 132 IBLA 110, 113-14 (1995); The Pittsburg & Midway Coal Mining Co. v. OSM, 115 IBLA 148, 157-60 (1990); N. L. Baroid Petroleum Services, 60 IBLA 90, 92 (1981); United States v. United States Pumice Co., 37 IBLA 153, 160-61 (1978) [dismissed sub nom. The Wilderness Society v. Andrus, No. 79-0296 (D.D.C. May 30, 1979)]." Thermal Energy Co., 135 IBLA 291, 305 (1996). The members of the Association had a direct interest in BLM's April 15, 1992,

9/ For example:

"a. Livestock will not be turned out before either (1) the soils in the uplands are sufficiently dried to support livestock use without compaction damage, or (2) April 15, whichever is later. Livestock turnout will occur in those areas that (1) had less than light use overall as measured at the end of the previous growing season, or (2) have a minimum of 4 inches of growth on the most prevalent of the following species: bottlebrush squirreltail and Thurber's needlegrass. Notwithstanding the above provisions, sheep turnout for the purpose of lambing will occur between March 26 and April 30. Areas used for lambing shall not be used for livestock grazing for the remainder of the growing season."

Stipulation, supra note 5, at 3. For the Association's concerns about this provision, see Exhibit 7, supra note 3, at 1-2.

10/ 43 C.F.R. § 4.472(a) provides: "The administrative law judge is vested with the duty and general authority to conduct the hearing in an orderly, impartial, and judicial manner, including authority to * * * recognize intervenors."

Decision and any potential modifications of it, as the Motion to Intervene filed December 7, 1993, supra note 2, made clear. They would have been entitled to appeal the April 15, 1992, Decision. See Glenn Grenke v. BLM, 122 IBLA 123, 128-29 (1992). They were therefore entitled to intervene as a matter of right. United States v. United States Pumice Co., supra at 157.

We have previously dealt with a case in which Judge Child dismissed an appeal without ruling on a motion to intervene. See Bear River Land & Grazing v. BLM, supra at 112. As a matter of practice, we believe a motion to intervene should be acted upon promptly so that both the moving party and other affected parties may plan their actions based on whether the motion was granted. Delay in ruling promptly can result in precisely the scenario Judge Child painted in responding to the question how it would have helped him to have a copy of the Stipulation: the Administrative Law Judge is uninformed about the basis for dismissal or other motion concerning an appeal, and one or more parties are disadvantaged. Indeed, that is what happened in this case. Cf. United States v. Miller, 138 IBLA 246, 268-69 (1997); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 695 (7th Cir. 1986); Raylite Electric Corp. v. Noma Electric Corp., 170 F.2d 914, 915 (2d Cir. 1948).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Child's January 10, 1994, Orders dismissing the appeals from BLM's April 15, 1992, Decision are vacated, the Association's Motion to Intervene is granted, and these cases are remanded to the Hearings Division for hearing.

Will A. Irwin
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge